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SUPREME COURT, U.S.

No. 82-874

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AT., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

Cases	Pages
California v. Grace Brethren Church, ___U.S.___, 102 S.Ct. 2498 (1982)	3, 4, 8
Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982)	2, 5, 7, 8
Fleming v. Rhodes, 331 U.S. 100 (1947)	3, 6
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v.

MILDRED M. EDWARDS, ET AL., RESPONDENTS

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Mildred M. Edwards and all persons similiarly situated, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Ninth Circuit in this case. The orders and decisions of the district court below, and the Ninth Cicuit are found in the Appendix attached to the Petition herein.

QUESTION PRESENTED

Petitioner has improperly stated the question presented. Petitioner's question actually begs the issue, for it assumes that the government's notice of appeal filed in the district court sought only partial appeal of this case. Respondents suggest the following is a more appropriate statement of the question presented:

> Whether, when a district court has held an Act of Congress unconstitutional in a case where an officer of the United States is a party, an appeal must always be taken directly to this Court under 28 U.S.C. §1252, rather than the Court of Appeals under 28 U.S.C. §1291.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioner's argument is premised on the contention that petitioner has appealed only the relief portions of the district court's judgment. The record, however, belies that assumption.

The district court held, as the government now acknowledges, that Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. §411(a)(5)(A), "violate[s] the due process clause of the Fifth Amendment because it unlawfully discriminated against women on the basis of sex." Memorandum Decision and Order, January 22, 1982, Appendix D to Petition, at 6a (footnote omitted). In response to that judgment, which also sets forth the manner in which petitioner was to determine benefits for class members, petitioner filed a simple Notice of Appeal. See Appendix G to Petition, at 17a.

Petitioner's notice of appeal states unambigously that he is appealing from "the final judgment" of the district court which, as petitioner concedes, included a holding that the statute at issue was unconstitutional. Consequently, this case fits squarely within the confines of 28 U.S.C. §1252,[1/] and is removed from the jurisdiction of the Court of Appeals under 28 U.S.C. §1291. Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982).

Petitioner seeks to remove himself from the ambit of §1252 by claiming that he has acquiesced in the unconstitutionality of the statute, and no longer wishes to pursue that issue.

[1/] There are four pre-requesites to §1252. First, the judgment below must be by an appropriate court of the United States. Second, the court must hold an Act of Congress unconstitutional. Third, the case must be a civil proceeding. Fourth, the United States or an officer thereof must be a party. 12 Moores Federal Practice, §411.11. All four pre-requisites are met in this case.

The Secretary's agreement that the statute was unconstitutional, however, did not fully resolve the merits of the case. In its January 22, 1982 decision, the Court below stated:

> "Defendant [Secretary] essentially conceded the unconstitutionality of §411(a)(5)(A) due to earlier court decisions. Hester v. Harris, 631 F.2d 53 (5th Cir. 1980); Carrasco v. Secretary of Health, Education and Welfare, 628 F.2d 624 (1st Cir. 1980); Becker v. Harris, 493 F.Supp. 991 (E.D.Cal. 1980). Despite those decisions the agency had continued to apply the challenged section." Memorandum Decision and Order, January 22, 1982, Appendix D to Petition, at 6a n.2 (emphasis supplied).

The question of the application of an unconstitutional statute to the respondent class was at the heart of the district court's decision.[2/] The relief aspects of the lower court's judgment were intertwined with and premised upon the unconstitutional ruling. As long as the "determination that a statutory provision was unconstitutonal 'was a necessary predicate to relief'", §1252 provides jurisdiction in this court for appellate review. California v. Grace Brethren Church, ___U.S.___, 102 S.Ct. 2498, 2506 (1982), quoting United States v. Clark, 445 U.S. 23, 26 n.2 (1980).

[2/] This court has long held that it maintains appellate jurisdiction under §1252 "when the ruling of unconstitutionality is made in the application of the statute to a particular circumstance ... rather than upon the challenged statute as a whole." Fleming v. Rhodes, 331 U.S. 100, 102-103 (1947) (discussing predecessor to §1252, Act of Aug. 24, 1937, 50 Stat. 752). See also, e.g., California v. Grace Brethren Church, ___U.S.___, 102 S.Ct. 2498, 2506 (1982).

Indeed, this Court in Grace Brethren Church, at 2506 n.16, noted that the lower court developments in Clark were virtually identical to those in this action. The only issue before the Court of Claims in Clark was relief to the plaintiffs, as the government had conceded that the unconstitutionality of the underlying statute had already been resolved in Gentry v. United States, 212 Ct.Cl. 27, 546 F.2d 343 (1976), rehearing denied 212 Ct.Cl. 27, 551 F.2d 852 (1977).

This Court held in Clark that for purposes of determining whether it had jurisdiction under §1252, it was "irrelevant" that the constitutionality of the statute was previously determined in another case, and concluded that the case fit squarely with §1252, even though the only issues considered by the court below related to relief. United States v. Clark, at 26 n.2. Thus, the fact that relief to the respondent class was petitioner's central focus in this action does not remove this case from §1252.

2. Petitioner has also premised his restrictive interpretation of §1252 on the laudable policy of seeking to minimize this court's mandatory appellate jurisdiction. However, this Court confirmed only last term that Congress explicitly intended that §1252 be "an unambigous exception to the policy of minimizing the mandatory docket of this Court." California v. Grace Brethren Church, at 2506.

Petitioner's arguments suggest a

> "gloss on §1252 [that] perhaps would be 'consonant with the overriding policy, historically encouraged by Congress of minimizing the mandatory docket of ... [the Supreme Court] ....' Gonzales v. Automatic Employees Credit Union, supra, 419 U.S. at 98, 95 S.Ct. at 294. We

> think, however, that in §1252 Congress unambigously mandated an exception to this policy in the narrow circumstances that the section identifies. The purpose of §1252 is too plain to allow circumvention, whatever doubts may be entertained about the wisdom of mandatory direct review in other circumstances." McLucas v. DeChamplain, 421 U.S. 21, 31 (1975). See also Donovan v. Richland County Association for Retarded Citizens, supra.

The legislative history of §1252 certainly supports this conclusion. As petitioner noted, "the direct appeal provision of §1252 was first enacted as section 2 of the Act of Aug. 24, 1937, Ch. 754, 50 Stat. 752." Petition, at 14. The Congressional debates in 1937, contrary to petitioner's assertions, reflect the desire to broaden the appellate review of the Supreme Court. In essence, Congress intended to remove a specific class of cases from the normal appellate process and place them quickly and completely before this Court. Thus, Representative Summers, Chairman of the Judiciary Committee and sponsor of the bill, summed up the effect of the act as follows:

> "It gives the right of appeal directly to the Supreme Court in cases where the right to appeal would now be to the Circuit Court of Appeals." 81 Cong.Record 3272 (1937).

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This policy was confirmed when the Senate added what is now the second paragraph of §1252 to the bill.[3/] The intent of this provision was to insure that all aspects of the case, including other possible appeals, were brought to the Supreme Court under §1252. Fleming v. Rhodes, 331 U.S. 100 (1947); United States v. Raines, 362 U.S. 26, 27 n.7 (1960); McLucas v. DeChamplain, supra, at 31; and Williams v. Zbaraz, 448 U.S. 358, 368 n. 10 (1980).

Rather than implying that there are ways to appeal portions of an action covered by §1252 to the Court of Appeals, the second paragraph merely demonstrates Congress' desire to insure that §1252 would be all-encompassing. By using language that covers all conceivable appeals filed both before and after a §1252 appeal, Congress emphasized that "§1252 brings before ...[the Supreme Court] not only constitutional questions but the whole case." McLucas v. DeChamplain, supra, at 31.

The results in McLucas illustrate this concept. Despite the fact that the underlying constitutional issue in McLucas has been resolved by this Court in Secretary of the Navy v. Avrech, 418 U.S. 676 (1974), Justice Powell, writing for the majority, held that the Supreme Court not only had jurisdiction to determine the propriety of requiring a three-judge court below, but also could resolve a separate issue of access to records which was "independent" of the

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[3/] Consequently, it is impossible for the House debates to be used to suggest the congressional intent behind the second paragraph of §1252. That portion was inserted by the Senate after the House debates, and there was little discussion by the Senate of its effect. See 81 Cong.Rec. 8514

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constitutional questions. McLucas, supra, at 33-34.[4/]

The "unambigous" intent of §1252 is to provide Supreme Court appellate review of all matters that the lower court passed upon while holding an Act of Congress unconstitutional. Since the present case falls within those guidelines, petitioner could have appealed the district court's rulings even as to relief to this Court under §1252; therefore, the Ninth Circuit was deprived of its jurisdiction under §1291. Donovan v. Richland County Association for Retarded Citizens, supra.

3. The ruling of the Ninth Circuit does not leave an important district court decision unreviewable. The Court of Appeals below merely held that the proper avenue of appeal in this case was not the Circuit Court, but the Supreme Court under §1252. The statutory scheme set up by Congress insured not only some review of the lower court, but prompt attention by the highest court in the land.

The only reason there will be no appellate review in this case is the "government's simple failure in this case to follow the clear commands of 28 U.S.C. §1252 and 28 U.S.C. §1291." Donovan, supra, at 714.[5/] The results of denying

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[4/] Similiarly, in Williams v. Zbaraz, supra, this Court took jurisdiction not only over the constitutional issue, but also over a statutory issue which had been resolved by the Court of Appeals even before the constitutional issue was inserted into the case.

[5/] The Secretary's mistake was that he simply failed to file a timely notice of appeal to this Court under §1252. The Secretary could easily have protected his position by following the government's practice in McLucas of filing two notices of appeal, one to this Court under §1252, and one to the Court of Appeals under §1291.

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the petitition for certiorari are no more harsh than in Donovan, where the district court's holding the statute unconstitutional was finalized even though the government maintained that the law was valid.[6/]

It is therefore respectfully submitted that the Secretary's petition for writ of certiorari should be denied.

DATED: January 24, 1983

Respectfully submitted,

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By _____
NEAL S. DUDOVITZ
Attorneys for Respondents

[6/] Since the ruling of the Court of Appeals below is consistant with a long line of recent decisions from this Court (e.g., McLucas, Clark, Ebaraz, Donovan, and Grace Brethren Church), it does not warrant this Court granting the petition for writ of certiorari. Petitioner's suggestion that this case is proper for summary disposition is equally in error. Given the rulings of this Court only last term in Donovan and Grace Brethren Church, any consideration of reversing the Ninth Circuit in this matter suggests a possible departure from precedent which demands plenary consideration.

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RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL., RESPONDENTS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, MILDRED M. EDWARDS, request leave of this court to file their opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in forma pauperis pursuant to Rule 46.

In support of this motion, Respondent is filing the accompanying affidavit of her counsel NEAL S. DUDOVITZ demonstrating that the district court below, United States District Court for the Northern District of California, has previously held that respondent is entitled to proceed in this matter in forma pauperis and meets the requirements of 28 USC §1915. Since the petitioner herein was the appellant in the United States Court of Appeals for the Ninth Circuit no subsequent in forma pauperis orders were required in this matter.

DATED: January 24, 1983

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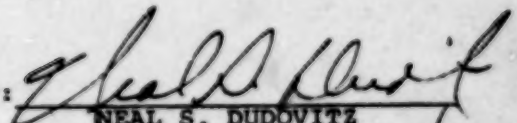
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Attorneys for Respondent

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AFFIDAVIT OF NEAL S. DUDOVITZ IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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1. I, NEAL S. DUDOVITZ, am a member of the Bar of the United States Supreme Court and of the Bar of the state of California. I have also been counsel of record in the above-referenced matter since it was first filed in October, 1980.

2. When this case was filed in the United States District Court for the Northern District of California, respondent sought to proceed in the matter in forma pauperis. Attached hereto as Exhibits "A" and "B" respectively are respondent's application to proceed in forma pauperis as well as our copies of respondent's affidavit in support of her application to proceed in forma pauperis.

3. Pursuant to this application, the district judge below granted the request to proceed in forma pauperis and issued an order on October 21, 1980 requiring the clerk of the district court to issue a summons without payment of filing fees and to have the complaint and summons served without cost by the United States Marshall. A copy of the district court's order of October 21, 1980, is attached hereto as Exhibit "C".

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4. The order of the Court of October 21, 1980, was the standard order issued by the United States District Court for the Northern District of California when granting a request to proceed in forma pauperis. I have confirmed this by a telephone conversation with the clerk's office of the Northern District of California on January 21, 1983. During that conversation, I was also informed that the Northern District has only this past week revised its form order so that the order will now specifically note that the application for in forma pauperis is being granted.

5. Since respondent prevailed in the district court, as appellee in the United States Court of Appeals for the Nint Circuit there were no fees or expenses required; thus, no application to proceed in forma pauperis was needed.

6. At all stages of this case, therefore, respondent has been permitted to proceed in forma pauperis, and has been found to meet the requirements of 28 U.S.C. §1915.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 24th day of January, 1983, at Los Angeles, California.

NEAL S. DUDOVITZ

Subscribed and sworn to before me this 24th day of January, 1983

Stephanie Barshefski
Notary Public in and for said County and State

OFFICIAL SEAL
STEPHANIE BARSHEFSKI
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires AUG 17, 1985

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Attorneys for Plaintiffs

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FILED

OCT 20 1980

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 80 3959 CBR

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MILDRED M. EDWARDS, both individually and on behalf of all others similarly situated, Plaintiff, vs. PATRICIA R. HARRIS, Secretary of the Department of Health and Human Services, Defendant.	Civil Action No. APPLICATION TO PROCEED IN FORMA PAUPERIS

MILDRED M. EDWARDS, plaintiff herein, through her attorneys, pursuant to 28 U.S.C. §1915 and for the reasons set forth in her attached affidavit, respectfully requests that she be permitted

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EXHIBIT A

to proceed in this action In Forma Pauperis.

Dated: October 17, 1980

REDWOOD LEGAL ASSISTANCE
NATIONAL SENIOR CITIZENS LAW CENTER
NATIONAL PARALEGAL INSTITUTE

Attorneys for Plaintiffs

By Barbara A. Midtbo
BARBARA A. MIDTBO, Esq.

EXHIBIT A

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ORIGINAL
FILED

OCT 20 1980

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 80 3959 MHP

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MILDRED M. EDWARDS, both individually and on behalf of all others similarly situated, Plaintiffs, vs. PATRICIA R. HARRIS, Secretary of the Department of Health and Human Services, Defendant.	Civil Action No. IN FORMA PAUPERIS AFFIDAVIT

I, MILDRED M. EDWARDS, say:

1. I am the named plaintiff in this action, a resident of Trinidad, California and a citizen of the United States.

2. I am not able to pay fees and costs necessary to commence the above-entitled action without impairing my ability to obtain

EXHIBIT B

NOTARIAL ACKNOWLEDGMENT

STATE OF CALIFORNIA)
) ss
COUNTY OF HUMBOLDT)

On October 17, 1980, before me, the undersigned, a Notary Public for the State of California, personally appeared MILDRED M. EDWARDS known to me to be the person who subscribed her name to the foregoing document and acknowledged to me that she executed the same.

RICHARD D. HENDRY
NOTARY PUBLIC
HUMBOLDT COUNTY, CALIFORNIA
My commission expires April 1, 1983

Richard D. Hendry
Notary Public for the State of California

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EXHIBIT B

the common necessities of life; nor am I able to give security therefor.

3. My present financial position is as follows:

MONTHLY INCOME

Social Security Retirement - LeRoy Edwards	$220.00
Wife's Benefits - Mildred Edwards	96.00
Rental Income	500.00
	$816.00

Number of persons dependent upon such income: Two

MONTHLY EXPENSES

Real Property Taxes, Insurance, and Maintenance (Residence and Rental Property on One Parcel)	$200.00
Utilities for Residence	125.00
Transportation	120.00
Food and Clothing	250.00
Medical Insurance and Expenses	100.00
Incidentals and Emergencies	21.00
	$816.00

4. The above-entitled action seeks review of an administrative decision of defendant denying my claim for Retirement Insurance Benefits under Title II of the Social Security Act.

5. I believe that I am entitled to the redress prayed for in the attached complaint.

WHEREFORE, I pray that this Court grant me leave to prosecute said action without being required to prepay costs or fees or give security therefor.

DATED: October 17, 1980.

Mildred M. Edwards

MILDRED M. EDWARDS, Affiant.

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EXHIBIT B

FILED
OCT 5 04 PM '80
RICHARD W. WIEKING
CLERK
U.S. DIST CT COURT
DIST OF CA

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MILDRED M. EDWARDS,

Plaintiff
(Petitioner)

vs.

PATRICIA R. HARRIS

Defendant
(Respondent)

Civil No. C 80-3959 MHP

ORDER PERMITTING ISSUANCE OF PROCESS

IT IS ORDERED that the Clerk issue summons in the above entitled action.

IT IS FURTHER ORDERED that the U.S. Marshal, for the Northern District of California, serve, without prepayment of fees, a copy of the complaint, petitioner's affidavit and this order upon the defendant.

DATED: OCT 21 1980

UNITED STATES DISTRICT JUDGE

EXHIBIT C

USC-CSA 7 8-80